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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment, WC Docket No. 17-84

Dear Ms. Dortch:

As we have previously explained,[1] the Commission's proposed adoption of one-touch make-ready[2] will spur broadband deployment. We continue to support that approach and have urged the Commission to reject attempts to undermine it.

Here, we provide additional information in support of multiple parties' suggestion that the Commission consider some revisions to Part III.C of the *Draft Order* to better implement its intention to address outdated rate disparities. The Commission is appropriately working to eliminate the outdated rate disparities that continue to thwart competition and broadband deployment by incumbent LECs, including Verizon. These disparities apply not just to new agreements, but to the "existing agreements" entered prior to the Commission's *2011 Pole Attachment Order*.[3] Such existing agreements govern the vast majority of Verizon's incumbent LEC pole attachments, are responsible for most of the ongoing rate disparities, and have proven nearly impossible to renegotiate.

Based on our experience in addressing and litigating pole attachment matters, we believe that to best achieve the Commission's goal of eliminating outdated rate disparities, the Commission should extend the new telecom rate presumption to all joint use agreements, including existing agreements. If the Commission declines to do so, we ask that the Commission, at a minimum, extend the new telecom rate presumption to those joint use agreements that were entered (or the rate term was amended) at a time that the incumbent LEC did not have equivalent bargaining power as defined by the Commission in the *2011 Pole*

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[1] *See*, *e.g.*, Verizon Ex Parte (July 25, 2018).
[2] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Draft Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 & WT Docket No. 17-79; FCC-CIRC1808-03 (rel. July 12, 2018) ("*Draft Order*").
[3] *Implementation of Section 224 of the Act*; *A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 218 (2011) ("*2011 Pole Attachment Order*").

Attachment Order and affirmed in paragraph 13 of the *Dominion Order*.[4] This will ensure that the Commission does not unintentionally perpetuate rate disparities by making it more difficult for incumbent LECs to obtain relief simply because their "inferior bargaining positions have continuously impacted their ability to negotiate a just and reasonable rate over time."[5] It will also provide needed standards for the industry, which could streamline negotiations and reduce the number of disputes requiring the Commission's intervention. And it will appropriately place the burden of proving and quantifying the value of alleged competitive benefits on the party that claims they exist.

This extension of the new telecom rate presumption is warranted because existing joint use agreements were not categorically, or even usually, negotiated by parties with relatively equal bargaining power. Instead, many were negotiated by small predecessor regional telephone companies that were at a distinct negotiating disadvantage relative to the power company. The records of the Pole Attachment Complaints filed by incumbent LECs since 2011, include, for example, joint use agreements entered into in 1961, 1979, and 2006 by incumbent LECs that then owned 7.8 percent,[6] 3.08 percent,[7] and 8 percent[8] of the relevant joint use poles. These Complaints also show that the rate provisions in older joint use agreements were typically amended when the incumbent LEC was at a significant or even greater disadvantage as measured by pole ownership numbers. For example, in one dispute, the rate provisions in five agreements were amended when the incumbent LECs owned 3 percent, 9 percent, 10 percent, 21 percent, and 25 percent of the relevant joint use poles.[9] And relative pole ownership numbers tell only part of the story, as many existing agreements were entered in a very different competitive and regulatory landscape that did not guarantee "just and reasonable" rates even between parties with roughly equivalent bargaining power. There were then typically just two entities attached to each pole, and each was highly regulated, had the same customer base, and was guaranteed a specified rate of return. Today, the landscape is far different. Many power companies continue to operate as monopoly providers with a guaranteed a rate of return, while incumbent LECs must compete with the other attachers for the right to provide services to the same customers, but must pay far higher pole attachment rental rates to do so.

Extending the new telecom rate presumption to existing agreements will further the Commission's policy goals. To date, Verizon's efforts to obtain competitively neutral rates for attachments governed by existing agreements have been consistently opposed by power companies, which have relied on so-called "evergreen clauses" that state that an existing

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[4] *See Verizon Va., et al. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750 ¶ 13 (EB 2017) ("*Dominion Order*").
[5] *Id*. ¶ 13 n.53.
[6] Pole Attachment Complaint Response Ex. A ¶¶ 8-9, *Verizon Fla. v. Fla. Power and Light Co.*, Docket No. 14-216 (EB-14-MD-003) (Apr. 4, 2014) ("*Verizon Fla. v. FPL*").
[7] Pole Attachment Complaint Response Ex. 1 ¶¶ 6, 14, *Frontier Commc'ns v. Duke Energy Carolinas*, Docket No. 14-215 (EB-14-MD-002) (Feb. 28, 2014) ("*Frontier v. Duke Energy Carolinas*").
[8] Pole Attachment Complaint ¶¶ 16-17, *Commonwealth Tel. Co., et al. v. Metropolitan Edison Co., et. al*, Docket No. 14-218 (EB-14-MD-008) (June 11, 2014) ("*Commonwealth Tel. v. Met-Ed*").
[9] *Id*.

agreement's terms and conditions will continue to govern all existing attachments if the agreement is terminated. Power companies argue that these clauses mean that incumbent LECs are "obligated to continue to honor their obligations under the Agreement, with respect to existing attachments, unless and until a new agreement can be reached or those attachments are removed from the poles."[10] At the same time, power companies "respectfully decline[]" to negotiate a new rate for existing attachments[11] and insist that they can "not be forced to accept a lower rate than that for which it bargained."[12]

Power companies have, as a result, tried to force incumbent LECs into an impossible choice between paying unreasonable rates or removing existing attachments. One company, for example, stated that "the existing joint use network [will] be governed by the existing agreements" and informed the incumbent LEC that it had the option to "remove its attachments from the . . . poles at any time."[13] Another claimed that a new rate could not "appl[y] to attachments made pursuant to the terms of the [existing] agreement."[14] Still another stated that it would consider providing Verizon "a pole attachment agreement similar to their competitors" but only "for new attachments."[15]

Termination of existing agreements, as a result, has not reduced rental rates for existing attachments. It has, however, negatively impacted broadband deployment, since some power companies have declined to negotiate a new agreement, even for future attachments. According to some power companies, "nothing in the FCC's order *requires* [utilities] to negotiate a new agreement"[16] because "granting ILECs access is not required by law."[17] Some power companies, as a result, have informed incumbent LECs that "the parties will not be negotiating a new agreement at all"[18] or that the utility did "not presently intend to enter into an agreement covering future attachments."[19] The incumbent LEC, therefore, would be required "to employ options other than joint use for any future deployment of services."[20]

Nor do provisions in agreements that allow either party to request renegotiation of the rental rate resolve the problem. Power companies have stalled or ignored requests to negotiate

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[10] Pole Attachment Complaint Response at 8, *Verizon Fla. v. FPL*.
[11] Pole Attachment Complaint Ex. 9 at 2, *Frontier Commc'ns v. Duke Energy Carolinas*, Docket No. 14-214 (EB-14-MD-001) (Jan. 17, 2014) ("*Frontier v Duke*"); *see also* Pole Attachment Complaint Ex. 40, *Commonwealth Tel. v. Met-Ed* ("FirstEnergy . . . is not inclined to renegotiate [the] agreement.").
[12] Mot. to Dismiss at 4, *Fla. Power & Light Co. v. Verizon Fla.*, No. 13-14808 (Fla. 11th Cir. Ct. Dec. 5, 2013).
[13] Pole Attachment Complaint Ex. 13 at 2, *Frontier v. Duke*.
[14] Pole Attachment Complaint Response at 24, *Commonwealth Tel. Co. v. UGI Utilities, Inc. – Elec. Div.*, Docket No. 14-217 (EB-14-MD-007) (Aug. 25, 2014).
[15] Pole Attachment Complaint Response Ex. A ¶ 46, *Verizon Fla. v. FPL*.
[16] Pole Attachment Complaint Ex. 22 at 1, *Frontier Commc'ns v. Duke Energy Progress*, No. 14-213 (EB-13-MD-007) (Dec. 9, 2013) ("*Frontier v Duke Energy Progress*").
[17] Pole Attachment Complaint Response Ex. A ¶ 46, *Verizon Fla. v. FPL*.
[18] *See*, *e.g.*, Pole Attachment Complaint Ex. 19 at 1, *Frontier v. Duke Energy Progress*.
[19] Pole Attachment Complaint Ex. 6 at 2, *Frontier v. Duke Energy Carolinas*.
[20] *Id.*

for years.[21] They have challenged renegotiation provisions as unenforceable agreements to agree that "cannot bind the parties with respect to renegotiation."[22] And they have taken the position that the only way for an incumbent LEC to obtain a new rental rate for existing attachments is through a Pole Attachment Complaint.[23] One argued, for example, that "for the 2011 Pole Attachment Order to have any effect on the express contracts *between these parties*, the FCC would need to specifically examine the terms and conditions of the parties' joint use agreements and make a determination specific to those agreements."[24] Another claimed that "an FCC complaint is Verizon's sole legitimate avenue for redress, if it believes the contract rate is unfair and unreasonable. . ."[25] Verizon thus remains locked into existing rates, even though the Commission held in 2011 that "where incumbent LECs have . . . access" to power company poles pursuant to an existing agreement, "they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[26]

The Commission should revise the *Draft Order* to remove statements that the Commission "previously found"[27] that existing agreements provide material benefits to incumbent LECs. The Commission did not previously make such a finding,[28] and doing so now would contradict the evidence and undermine the Commission's rate parity goals.

A main sticking point during negotiations has been whether incumbent LECs enjoy "competitive benefits" under its existing agreements. In our experience, power companies routinely assert that the incumbent LEC is advantaged over its competitors without quantifying

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[21] *See*, *e.g.*, Pole Attachment Complaint ¶ 29, *Verizon Va., et al. v. Va. Elec. and Power Co.*, Docket No. 15-190 (EB-15-MD-006) (Aug. 3, 2015) ("*Verizon Va. v. Dominion*") (noting that the power company's first rate offer was made over one year into the negotiations, and sought to increase the rate paid by Verizon); Pole Attachment Complaint ¶¶ 21-38, *Verizon Fla. v. FPL* (describing years-long effort beginning in June 2011 to obtain a new rental rate).

[22] Mot. for Summ. J. at 11, *Tampa Elec. Co. v. Verizon Fla.*, Civ. No. 12-016329 (Fla. Cir. Ct. Mar. 25, 2014); *see also* Mot. to Seal Ex. 2 at 16, *Va. Elec. and Power Co. v. Verizon Va., et al.*, Case CL-15003029-00 (Va. Cir. Ct. Mar. 10, 2017) ("Although this article does provide for readjustment of the parties' Joint Use Agreements' rental rate, under Virginia law, it does not impose a binding obligation on either of the parties.").

[23] *See*, *e.g.*, Mot. for Summ. J. at 15, *Tampa Elec. Co. v. Verizon Fla.*, Civ. No. 12-016329 (Fla. Cir. Ct. Mar. 25, 2014) ("If Verizon believes the rate provisions within the Joint Use Agreement are unjust and unreasonable . . ., the proper course of action is to file a FCC pole attachment complaint."); Pole Attachment Complaint Response at 19, *Commonwealth Tel. v. Met-Ed* (arguing that the Commission must "analyze on a case-by-case [basis] whether bargaining power exists").

[24] Mot. to Seal Ex. 2 at 12, *Va. Elec. and Power Co. v. Verizon Va., et al.*, Case. CL-15003029-00 (Va. Cir. Ct. Mar. 10, 2017) (emphasis in original).

[25] Mot. to Dismiss Reply at 8, *Fla. Power & Light Co. v. Verizon Fla.*, No. 13-14808 (Fla. 11th Cir. Ct. Jan. 17, 2014).

[26] *2011 Pole Attachment Order* ¶ 202.

[27] *Draft Order* ¶ 119; *see also* ¶¶ 115, 117 n.393, 118.

[28] *See 2011 Pole Attachment Order* ¶ 216, n.654 (summarizing, but not adopting, commenters' claims about alleged competitive benefits).

or providing evidentiary support for the claim.[29] Indeed, power companies have hampered incumbent LECs' ability to test power company claims of advantage by denying access, even on a confidential basis, to the company's signed license agreements.[30] In most negotiations, the power company has shared only a draft "template" license agreement that may not have been accepted by any attacher.[31] But even compared to these best-case scenario terms, we have not yet identified an existing agreement that provides us a net material advantage over competitors as the power companies claim.

Instead, power companies often rely on alleged "advantages" that are, and always will be, unavoidable because they are the result of historic circumstance, such as the incumbent LEC's position at the lowest point on the pole (which is, in fact, a more costly position)[32] or one-time decisions made decades ago when facilities were initially placed. Power companies have seized on these alleged benefits to assert that incumbent LECs can never "obtain the same rate as a CLEC attacher" because it "is not possible" for an incumbent LEC to "somehow retroactively, relinquish each and every one of its historical joint use benefits, including remaining at the lowest spot on the pole."[33] They thus seek to justify high rates for all incumbent LEC attachments because networks "cannot be 'unbuilt' and reconstructed under new agreements more akin to [a utility]'s agreements with CLECs."[34]

Power companies also ignore the Commission's prior instruction that the comparative analysis must "weigh, and account for, the different rights *and responsibilities*" imposed on incumbent LECs under joint use agreements.[35] The *2011 Pole Attachment Order* thus required that the incumbent LEC enjoy a "net" material advantage over its competitors to justify a higher rate.[36] This distinction is important because, under most agreements, the incumbent LEC (but not its competitors) is required to provide to the power company each alleged "benefit" that it receives. The cost to the incumbent LEC to provide that "benefit" cancels out any alleged benefit received, making it improper for power companies to charge higher rates by "identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements."[37]

Power companies also improperly claim that incumbent LECs are advantaged because they incur the same cost in a different way. For example, they allege that incumbent LECs pay

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[29] *See*, *e.g.*, *Dominion Order* ¶ 20 (noting that, "with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives").
[30] *See, e.g.*, Pole Attachment Complaint Reply at 24, *Commonwealth Tel. v. Met-Ed*.
[31] *See, e.g.*, Pole Attachment Complaint ¶¶ 22, 25, *Verizon Va. v. Dominion*; Pole Attachment Complaint ¶ 63, *Frontier v. Duke*; Pole Attachment Complaint ¶ 58, *Frontier v. Duke Energy Carolinas*.
[32] *See* Pole Attachment Complaint ¶¶ 64-67, *Verizon Va. v. Dominion*; Pole Attachment Complaint ¶¶ 52-57, *Verizon Fla. v. Fla. Power and Light Co.*, Docket No. 15-73 (EB-15-MD-002) (Mar. 13, 2015).
[33] Pole Attachment Complaint Response at 30, *Verizon Fla. v. FPL*.
[34] Pole Attachment Complaint Response at 3, *Frontier v. Duke Energy Progress*.
[35] *See 2011 Pole Attachment Order* ¶ 216, n.654 (emphasis added).
[36] *Id.* ¶ 218.
[37] *Dominion Order* ¶ 21.

to power companies "significantly lower make-ready costs" and do not pay "post-attachment inspection costs" because incumbent LECs do not pay power companies to complete those tasks at cost, as their competitors do.[38] But that does not mean that incumbent LECs, in fact, incur fewer costs. Instead, the incumbent LEC "performs [the] service itself and incurs costs comparable to its competitors in performing that service."[39] To construe this difference as a benefit and "charge a higher rate on this basis would effectively double charge [the incumbent LEC]."[40]

Power companies improperly rely on other alleged benefits that do not advantage incumbent LECs. Some alleged benefits amount to trivial one-time fees for attachments made long ago, such as a one-time application fee, that the power company wants to collect and recollect on every pole every year by embedding it into the incumbent LEC's rental rate. Others seek to impose on incumbent LECs costs that the power company is not permitted to charge any attacher, such as per-attachment rental rates.[41] The Commission's telecom formula "determines the maximum just and reasonable rate *per pole*,"[42] as it must under a statute that requires that the unusable space on a pole be equally divided among all attaching entities – not attachments.[43]

The Commission, therefore, should delete language from the *Draft Order* that states that existing agreements provide competitive benefits, and implies that the alleged benefits have, in fact, benefited incumbent LECs.[44] At a minimum, the Commission should ensure that its *Draft Order* does not pre-judge whether competitive benefits are inherent in existing agreements or whether the alleged competitive benefits will justify a higher rate in new agreements. It should also reinforce its prior holding that a higher rate for an incumbent LEC is only justified if the incumbent LEC enjoys a *net* material advantage over its competitors and should confirm that it will be the exception – and not the rule – that an incumbent LEC is so advantaged. Strong language clarifying that certain alleged benefits do not justify a higher rate will also help negotiations and reduce the need for further litigation on these topics. For example, a power company should not be able to receive a rate higher than the new telecom rate based on costs that it has not incurred (such as make-ready costs and inspection fees), amounts that it has no right to receive from any attacher (such as per-attachment rental rates), costs that it also imposes on the incumbent LEC, or one-time costs that may have been incurred – if ever – years ago when the network was built.

More appropriately, the Commission should insert language directly in its *Draft Order* to make clear that even for existing agreements, incumbent LECs should be presumptively entitled to the new telecom rental rate. Doing so will appropriately place the burden to prove and quantify the value of alleged benefits on the entity that claims they exist. It will also eliminate

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[38] *See Draft Order* ¶¶ 115, 117 n.393, 118, 119.
[39] *Dominion Order* ¶ 18.
[40] *Id*. ¶ 18 n.67.
[41] *See Draft Order* ¶ 117 n.393.
[42] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 112103, ¶ 31 (2001) (emphasis added).
[43] *See* 47 U.S.C. § 224(e).
[44] *See Draft Order* ¶¶ 115, 117 n.393, 118, 119.

some of the many issues that have complicated negotiations, required extensive litigation, perpetuated outdated rate disparities, and undermined Verizon's broadband deployment goals.

Sincerely,

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